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No. 10-389

IN THE

Supreme Court of the United States

JOSE GUEVARA,
Petitioner,

v.

REPUBLICA DEL PERU, AND
MINISTERIO DEL INTERIOR DEL PERU,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARK A. CYMROT
Counsel of Record
LEE H. SIMOWITZ
AMBIKA J. BIGGS
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 861-1500
mcymrot@bakerlaw.com

Counsel for Respondents

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QUESTION PRESENTED

The petition does not raise an issue of law, but rather a dispute about the insufficiency of Plaintiff Jose Guevara's evidence. The Eleventh Circuit correctly found that Guevara's evidence failed to prove any "direct effect" in the United States from Peru's reward offer for accurate information directly enabling the capture of an infamous fugitive. Without a "direct effect" in the United States—*i.e.*, without any nexus between the conduct and the United States—the Eleventh Circuit dismissed the case for want of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(2). The Eleventh Circuit did not hold that the "direct effect" had to be a "legally significant act" or satisfy a requirement of "substantiality" or "foreseeability," as the petition suggests. These arguments were not made below and thus, not addressed by the Eleventh Circuit. Accordingly, they were not properly preserved for this Court.

Guevara's evidence of "direct effect" fails to raise any novel or highly disputed issues. He argues that his arrest in Miami was "in connection with" commercial activity of Peru; the Eleventh Circuit correctly held his arrest was in connection with his criminal activity. The Eleventh Circuit also correctly held that Peru's refusal to pay Guevara in the United States was not required by the reward offer, thus distinguishing this case from *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992). *See Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 75 (2d Cir. 2010) (no direct effect where payment in United States not contractually required).

The circuit split interpreting the FSIA's nexus requirement, that Guevara asserts, is illusory and immaterial to the outcome of this case. The three judges of the Eleventh Circuit, including the dissent, agreed that this case was not appropriate for a United States court to decide, as argued by the United States in its amicus brief to the Eleventh Circuit. And there are numerous additional bases to support the result.

The petition, thus, should be denied.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF THE CASE	2
A. Factual Record	2
B. Proceedings Below	5
SUMMARY OF ARGUMENT	9
ARGUMENT	11
CONCLUSION	21
APPENDIX	
APPENDIX A: Emergency Decree No. 049-2001	1a
APPENDIX B: Federal Bureau of Investigation's Response to Plaintiff's Motion to Compel Compliance with Trial Subpoenas	12a
APPENDIX C: Brief for the United States as *Amicus Curiae* in Support of Republica Del Peru	20a

TABLE OF AUTHORITIES

CASES — Page

American Telecom Co., LLC v. Republic of Lebanon, 501 F.3d 534 (6th Cir. 2007) 18

Guevara v. Republic of Peru, 468 F.3d 1289 (11th Cir. 2006) 1, 2, 6, 7, 12, 20

Guevara v. Republic of Peru, 608 F.3d 1297 (11th Cir. 2010) 2, 12, 19

Guirlando v. T.C. Ziraat Bankasi, A.S., 602 F.3d 69 (2nd Cir. 2010) 16

Hanil Bank v. PT. Bank Negara Indonesia, 148 F.3d 127 (2d Cir. 1998) 16

Harris Corp. v. Nat'l Iranian Radio & Television, 691 F.2d 1344 (11th Cir. 1982) 13

Republic of Argentina v. Weltover, 504 U.S. 607 (1992) 13, 14, 16, 17, 18

Saudi Arabia v. Nelson, 507 U.S. 349, 362 (1993) 14

STATUTES

18 U.S.C. §§ 371 4

18 U.S.C. §§ 875(b) 4

28 U.S.C. § 1605(a)(2) 1, 11, 12, 14, 16, 17

MISCELLANEOUS

67 Am. Jur. 2nd Rewards § 5 10

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OPINIONS BELOW

This case has been before the United States Court of Appeals for the Eleventh Circuit twice. The Eleventh Circuit's first decision in this case held that "a foreign state's offer of a reward in return for information enabling it to locate and capture a fugitive" fell within the FSIA's commercial activity exception. 28 U.S.C. § 1605(a)(2). The decision, which reversed the district court's dismissal of Guevara's lawsuit, is reported at 468 F.3d 1289 (11th Cir. 2006) ("*Guevara I*").

On remand, the district court granted partial summary judgment in favor of Guevara and denied Peru's cross motion for summary judgment, finding Guevara had earned the reward and thus "effectively preempting the . . . evaluation decision" of the Peruvian governmental body (Special High Level Committee or "SHLC") that determined that Guevara had not earned the reward. 608 F.3d F.3d 1297, 1305. In response to Peru's argument that its conduct had insufficient nexus to the United States for jurisdiction under the FSIA, the district court held that the Eleventh Circuit already had decided the jurisdictional issues in *Guevara I*. The district court conducted no further analysis. This decision is published at 2008 WL 4194839.

The Eleventh Circuit's second decision reversed the district court, holding that: (1) it had not decided the nexus issue in *Guevara I*, and (2) the district court lacked subject matter jurisdiction because Peru's reward offer did not cause a direct effect in the United States under FSIA's commercial activity exception. That decision is reported at 608 F.3d 1297 ("*Guevara II*").

STATEMENT OF THE CASE

A. Factual Record

Plaintiff Jose Guevara, a former Venezuelan intelligence officer, provided security and a safe house in Venezuela for Vladimiro Montesinos, the fugitive head of Peru's National Intelligence Agency, who had purportedly committed a string of crimes, including arms and drug trafficking, money laundering, extortion, bribery, and multiple murders. 3a-5a of Guevara Appendix A (hereinafter cited as "Guevara App. A, __"). The first media leaks of Montesinos'

videotapes exposing some of his crimes led to the resignation of Peruvian President Alberto Fujimori, and created a political and constitutional crisis that had repercussions in Peru for many years. Guevara App. A, 3a. Montesinos quickly fled the country and disappeared.[1] Guevara App. A, 3a.

When the trail for Montesinos went cold, Peru's interim President Valentin Paniagua Corazao issued an Emergency Decree providing for a $5 million reward for "accurate information that will directly enable the locating and capturing" of Montesinos. Guevara App. A, 4a; Emergency Decree, Peru Appendix A (hereinafter referred to as "Peru App. A, __"). If more than one person supplied information, the reward would be split among them. The reward offer expressly required that information had to be provided to the SHLC, and that the SHLC would decide any reward claims. Guevara App. A, 4a. The decree authorized the government to take a loan from, and open an account in, a Peruvian state-owned bank to pay the reward. Guevara App. A, 4a. The decree gave the reward recipients no right to determine the place of payment.

While harboring Montesinos, Guevara and others extracted at least $55 million from him as protection money. DE 296-3, pp. 41589-92; DE 295-3, pp. 4544-45; DE 295-2; p. 45,757; DE 296-6, pp. 68890, 68900.[2] When Montesinos was running out of money,

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[1] The Eleventh Circuit recounted the facts in the light most favorable to Guevara. We include a more complete recitation of the record before the district court.

[2] DE refers to the docket entry number on the docket in the U.S. District Court for the Southern District of Florida, Case No. 1:04-cv-23223-MGC.

Guevara made trips on Montesinos' behalf to Lima, Bogotá, Miami and Nassau, Bahamas seeking additional funds. DE 201-2, pp. 35, 36, 94. On June 22, 2000, Guevara was arrested in Miami by the FBI after attempting to extort a banker to release a total of $3.7 million from one of Montesinos' bank accounts. Guevara App. A, 10a. Guevara was charged with extortion and fraud against the United States. 18 U.S.C. §§ 875(b), 371. DE 201-2, p. 108; DE 201-6.

While in FBI custody, Guevara was told that he would be released and the charges dropped if he cooperated in Montesinos' capture. He also was informed of Peru's reward offer, which the FBI was aware of from published reports. Guevara App. A, 5a-6a. Supervisory Special Agent Kevin Currier testified that Guevara had agreed to cooperate with the FBI before he was informed of Peru's reward. DE 319-3, pp. 39-42. Currier, who was stationed in Lima, consulted with Minister of the Interior Antonio Ketín Vidal and worked out a plan for Montesinos' capture. DE 201-3, p. 125. In a single telephone conversation from Lima, Vidal and Currier told FBI Agent Waldo Longa in Miami to instruct Guevara to have his accomplices in Caracas deliver Montesinos to the Peruvian ambassador's residence. Guevara App. A, 12a-13a. Vidal also explained the terms of the reward to Longa who passed the information to Guevara. Guevara App. A, 13. Guevara then called his accomplice in Venezuela and supposedly gave the instructions. Guevara App. A, 13a.

Montesinos never arrived at the Peruvian ambassador's residence; he was captured that same night by the Venezuelan authorities. Guevara App. A, 13a. The next day Venezuelan President Hugo Chavez

announced that Venezuela had found and arrested Montesinos. DE 201-3, pp. 55, 68; DE 201-4, p. 58. In a diplomatic flap with both Peru and the United States, Venezuela said it alone had located Montesinos.[3] The head of the FBI's Miami field office stated publicly he did not know how Montesinos was arrested, and Guevara told the media that the Venezuelan government had known all along where Montesinos was hiding. DE 285-14, DE 265-1, DE 201-2, pp. 69-73.

Guevara then submitted a claim for the reward to the SHLC, which conducted an extensive investigation, including meetings and correspondence with FBI Agent Currier and Guevara's lawyer. DE 326-5, ¶ 5. Despite repeated requests over a two-year period, Currier could not connect Montesinos' arrest to Guevara's purported cooperation. DE 326-5, ¶¶ 6, 7, 14. Guevara, who was in the best position to provide evidence regarding the circumstances of the arrest, relied only on the coincidence of timing between his call to Caracas and Montesinos' subsequent arrest. The SHLC, therefore, concluded that the Venezuelan Government's intervention was an independent event that resulted in Montesinos' arrest, and denied Guevara's claim. DE 326-5, ¶¶ 16, 19; DE 201-4, pp. 20-21.

B. Proceedings Below

Guevara filed suit against Peru and two ministers seeking the reward in Florida state court. Guevara App. A, 6a. After removing the case to federal court, Peru moved to dismiss on the grounds of sovereign

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[3] Venezuela's tension with Peru and the United States is reported in a June 29, 2001 Associated Press Worldstream article. DE 285-14.

immunity. Guevara App. A, 6a-7a. Peru argued that a reward offer did not constitute "commercial activity" that had sufficient "nexus" to the United States under the FSIA. DE 17, ¶¶ 10, 11. The district court dismissed, ruling that a reward offer was not commercial activity. Guevara App. A, 17a. The court did not address Peru's nexus argument. DE 31.

The Eleventh Circuit reversed in *Guevara I*, holding that the reward offer was commercial activity. Guevara App. C. Because it was not a basis for the district court ruling, the nexus issue was not presented to the Eleventh Circuit, and the court's opinion did not address the issue. Guevara App. A, 17a.

On remand, Peru preserved the nexus issue in its answer. In the midst of discovery, Guevara moved for partial summary judgment, and Peru responded, in part, by again arguing the nexus issue. DE 200, pp. 17-18. The district court granted Guevara partial summary judgment on his breach of contract claim, finding that Guevara had earned the reward. The court relied principally on its interpretation of a preliminary SHLC resolution that purportedly acknowledged Guevara's role in Montesinos' arrest. Guevara App. A, 14a. This interpretation was contested by an affidavit from the SHLC Chairman, and on reconsideration, by three additional affidavits, including by the draftsman of the resolution. DE 201-8, ¶ 3; 285-15, ¶¶ 12-13; 285-20, ¶¶ 4-5; and 285-21, ¶¶ 3-5. The district court also relied upon a conclusory, hearsay affidavit by FBI Agent Currier stating that Guevara's cooperation "indirectly" resulted in Montesinos' arrest, which fails on its face to satisfy the causation requirement in the reward decree ("directly enabling"). Guevara App. B, 40a-

41a; DE 119-3, ¶ 16. Currier acknowledged in his deposition that he had no personal knowledge regarding the circumstances of Montesinos' capture.

In opposing Guevara's motion to compel Agents Longa and Currier to testify at trial, the FBI disavowed Currier's affidavit, saying it was unauthorized and did not reflect the position of the FBI. Peru App. B, p. 16a, n.2.

On reconsideration, Peru submitted two sworn affidavits from the Venezuelan Congressional record by Guevara's accomplice, stating that Guevara had secretly signaled him on the telephone call from FBI custody to murder Montesinos. DE 297-6, p. 43, DE 326-3, pp. 4546-47, 4549-50. Guevara did not dispute these statements, in an affidavit or otherwise, and they stand uncontested on this record. DE 319-1, pp. 16, 17. Guevara's assertion that he had cooperated with the FBI to bring about Montesinos' capture thus evaporated, along with any possible dispute regarding his ineligibility for the reward.

On the nexus issue, the district court found that the issue had already been decided by the Eleventh Circuit in *Guevara I*, and said no more. Guevara App. A, 13a. After the district court denied reconsideration, Peru appealed. DE 284, 344, 349.

Guevara did not address the nexus issue in his briefing before the Eleventh Circuit, aside from asserting that the Eleventh Circuit already had determined the issue in the previous appeal. At oral argument, the Eleventh Circuit offered Guevara the opportunity to identify a nexus between Peru's commercial activity and the United States.

After oral argument, the United States submitted an amicus brief urging reversal of the district court,

which the Eleventh Circuit accepted. Brief for the United States as Amicus Curiae in Support of Republica Del Peru, Peru App. C. The United States said:

> To protect the prerogatives of the Executive Branch in its conduct of foreign affairs, both the act of state doctrine and principles of international comity generally preclude U.S. courts from reviewing and overriding the sovereign decisions of foreign states and foreign tribunals. Particularly because this judgment against Peru presents two serious foreign-relations dilemmas for the United States, the doctrines are fully applicable here.

Peru App. A, pp. 35a-36a.

In reversing the district court, the Eleventh Circuit found that it had not previously decided the nexus issue, which had been properly preserved by Peru. Guevara App. A, 15a. On this issue, Judge Cox dissented but suggested, nonetheless, the case might not be appropriate for resolution by a United States Court under the doctrine of international comity. Guevara App. A, 32a.

On the merits of the nexus issue, the Eleventh Circuit responded to Guevara's nexus argument by finding that Guevara's arrest in Miami was in connection with his own criminal—not Peru's commercial—activity. Guevara App. A, 25a-26a. Peru's alleged refusal to make payment in the United States fails as a direct effect because Guevara had no right to payment in the United States; the Emergency Decree established a loan and bank account in Peru for payment. Guevara Appendix A, 4a. The Eleventh Circuit also found that Peru's refusal to pay the

reward to Guevara was a "negative activity" that alone did not satisfy the commercial activity exception. Guevara App. A, 25a.

The Eleventh Circuit held that the "one-off" telephone conversation among the two FBI agents and the Peruvian Minister did not constitute an act in connection with commercial activity. Guevara App. A, 25a. (During oral argument Guevara appeared to abandon, as evidence of direct effect, that single telephone call. *Id.*) The Eleventh Circuit found this call to be an insufficient basis to exercise personal and subject matter jurisdiction over a foreign state by analogy to the minimum contacts test for Due Process. Guevara App. A, 25a.

SUMMARY OF ARGUMENT

Guevara's petition founders on two misconceptions: (1) he misstates the Eleventh Circuit's holding in order to argue that a purported circuit split on the "direct effects" rule under the FSIA is relevant and case dispositive; and (2) he also misstates the record in arguing that the FBI and State Department differ on the handling of this case.

Peru's reward offer had no effect—legally significant or otherwise—in the United States; the Emergency Decree required all material events to occur in Peru, and Guevara's claims of a direct effect are factually inaccurate and legally deficient by any precedent. Guevara's case was properly dismissed for lack of subject matter jurisdiction, and even if subject matter jurisdiction were present, his case would be dismissed on principles of international comity (as even the dissent in the Eleventh Circuit suggested) and act of state, as well as numerous other grounds

including the merits (Guevara did not earn the reward).

Public policy also supported dismissal. As set forth in the United States' amicus curiae brief, assuming jurisdiction over a foreign reward program would violate principles of international comity, create serious diplomatic tensions, and necessarily result in United States law enforcement and diplomatic decisions regarding our own reward programs being subjected to review by foreign courts. The United States stated:

> [T]he federal government has a profound interest in preventing the district court's judgment from undermining our nation's relationship with a stable democratic partner in South America. Moreover, the United States operates its own highly successful international reward programs, and the judgment here raises the troubling specter of foreign courts overriding decisions made by U.S. law enforcement and diplomatic officials.

Peru App. C, 28a. The United States has at least 15 statutory reward programs, and frequently denies reward claims. 67 Am. Jur. 2d Rewards § 5. As the United States recognized, any interference by the United States in Peru's sovereign decisions regarding a notorious former government official would stress an otherwise friendly relationship. The United States, therefore, urged the Eleventh Circuit to dismiss Guevara's case on the alternative grounds of international comity and act of state.

The question presented, as framed by Guevara, did not and could not have determined the result of this case. The single phone call, and Peru's "negative

activity" in failing to pay the reward, had no direct effect in the United States, regardless of whether those actions or non-actions are characterized as "legally significant acts." The Eleventh Circuit's ruling was correct, and numerous other grounds support dismissal. The petition should be denied.

ARGUMENT

Even if properly preserved for this Court—which it was not— Guevara's arguments do not raise the issue of whether a "legally significant act" must occur in the United States, as the petition argues.[4] Guevara did not raise the issue below, the Eleventh Circuit did not address the issue, and none of Guevara's arguments for direct effect turn on the outcome of this issue. Under any existing interpretation of the direct effect clause, Peru's conduct did not waive sovereign immunity under the FSIA.

The Eleventh Circuit held that the evidence did not establish that Peru's activities fell within any of the three clauses of FSIA's commercial activity exception, including the direct effect clause. Guevara App. A, 20a-26a. In his petition, Guevara concedes the first two clauses do not apply and challenges only the

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[4] Guevara incorrectly asserts that this issue was raised below and addressed by the Eleventh Circuit two times. Petition for Writ of Certiorari, (hereinafter cited as "Pet. _"), pp. 10-11. Neither opinion addressed whether a "legally significant act" must occur within the United States under the commercial activity exception. The Eleventh Circuit's first opinion addressed whether the offer of a reward was commercial activity. *Id.* at 48a. The second opinion addressed whether Peru's acts fell within any of § 1605(a)(2)'s three clauses. *Id.* at 20a-26a. Guevara did not raise below and the courts did not address whether a "legally significant act" must occur in the United States.

Eleventh Circuit's determination that the third clause—or "direct effect" clause—does not establish an exception to immunity for Peru. The clause provides an exception to immunity when:

> . . . the action is based . . . [3] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

§ 1605(a)(2). Guevara argues that the Court should grant his Petition so that the Court can resolve a purported circuit split on "whether the commercial activity exception's 'direct effect' clause requires evidence that a 'legally significant act' occurred within the United States in the order to vest American courts with jurisdiction over a foreign sovereign." Pet., i-ii, Question Presented.

This case is not appropriate for resolving those issues. Guevara did not raise in the courts below the issue of whether Peru's purported actions involving the United States were or were not "legally significant," or whether any circuit split on that question existed. Rather, he merely asserted that the Eleventh Circuit already had decided the issue of the court's subject matter jurisdiction in its 2006 *Guevara I* opinion. The Eleventh Circuit did not require Guevara to plead or prove the existence of a "legally significant act." Indeed, the Eleventh Circuit did not address the "legally significant act" issue in *Guevara II* at all—understandably so, because Guevara did not raise it. As this issue has not been preserved, the Court should deny Guevara's petition on this ground alone.

As support for his argument that the Eleventh Circuit applied the "legally significant act" test, Guevara states that the question the court defined was whether "the effect was sufficiently 'direct' and sufficiently 'in the United States' that Congress would have wanted an American court to hear the case." Pet. 14 (citing Guevara App. A, 23a-24a). This language clearly shows that the Eleventh Circuit was concerned about whether the *effect* was sufficiently in the United States, not whether the *conduct or act* was sufficiently in the United States. In determining whether Peru fell within the "direct effect" clause of the commercial activity exception, the Eleventh Circuit correctly held that "[n]either of Guevara's arguments for a direct effect in the United States reflects [*Republic of Argentina v.*] *Weltover* [504 U.S. 607 (1992)]'s requirement of immediate consequences or *Harris Corp. [v. Nat'l Iranian Radio & Television*, 691 F.2d 1344 (11th Cir. 1982)]'s focus on significant financial consequences in the United States. Therefore, we cannot conclude that a direct effect occurred in the United States as a result of Peru's promise to pay the reward money." Guevara App. A, 26a.

The Eleventh Circuit thus was not called on to assess the nature or quality of Peru's alleged acts—"legally significant" or not—because no act was alleged or proven that could possibly have had a direct effect in the United States. Equally to the point, the Eleventh Circuit did not require that Guevara prove a "legally significant act," either in the United States or outside it. Because Guevara did not have to meet any such legal standard, that test had no significance to the outcome of this case.

Guevara's petition consists mostly of an academic discussion of the "legally significant act" test in the

courts; the petition barely attempts to identify Peru's acts that supposedly waived its sovereign immunity under the FSIA. Guevara argues that the reward "offer itself constituted commercial activity." Pet. 17-18. Guevara maintains that he accepted Peru's offer by performing in the United States, "*i.e.*, he provided information and coordinated efforts from the United States which led to the location and capture of the fugitive Montesinos[,]" which presumably provided the "direct effect" on the United States under the third branch of § 1605(a)(2). Pet. 18. The record does not support his argument, and Peru's reward offer defined acceptance as the delivery of information to the SHLC *in Peru*.

Guevara's arrest was not commercial activity carried on by Peru, in the United States or in Peru. As the Eleventh Circuit properly held, Guevara's arrest and subsequent cooperation was in connection with Guevara's criminal activity, not the reward. Guevara App. A, 25a-26a ("Guevara's arrest was 'an immediate consequence' of his criminal activity, not of Peru's offer of a reward for Montesinos's capture" (quoting *Weltover*, 504 U.S. at 618). Law enforcement activities do not fall within the commercial activity exception. *Saudi Arabia v. Nelson*, 507 U.S. 349, 362 (1993) ("Exercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce."). Guevara's call to Caracas was not a condition of the reward; it was law enforcement activity which cannot provide the basis for jurisdiction under the commercial activity exception.

The factual record also defeats Guevara's argument. Guevara was required to make the call to Venezuela for the much more immediate purpose of

obtaining his "get out of jail free card" from the FBI. DE 319-3, pp. 39-42. Guevara submitted no evidence suggesting he was motivated to make the Venezuela call to earn the reward; according to FBI Agent Currier, Guevara had agreed to cooperate with the FBI before he knew about Peru's reward offer. DE 319-3, pp. 39-42; DE 119-3, ¶ 8. Even assuming that his purported cooperation would satisfy the reward offer, the uncontested evidence is that Guevara was only feigning cooperation while ordering Montesinos's murder from FBI custody. DE 297-6, p. 43, DE 319-1, pp. 16, 17, DE 326-3, pp. 4546-47, 4549-50. In addition, Guevara presented no evidence that his telephone call to Caracas was related to Montesinos's capture, except as a *post hoc, ergo procter hoc* coincidence of time. He even admitted that the Venezuelan government did not need his information; they knew where Montesinos was from the outset. DE 285-14; DE 201-2, pp. 69-73.

Nor could the reward offer itself have a direct effect in the United States. Reciting the facts in the light most favorable to Guevara, the Eleventh Circuit confronted a record in which the Emergency Decree defined the operative performance as the receipt of information by the SHLC *in Peru* (which never occurred); Guevara made a claim to the SHLC *in Peru*; his counsel met with members of the SHLC *in Peru*; the alleged breach of contract occurred when the SHLC, after an extensive and good faith review, denied Guevara's claim *in Peru*; and Peru declined to make payment from a bank account authorized by the Emergency Decree to be opened *in Peru*. Guevara App. A, 20a; Peru App. A, pp. 1a-6a. Guevara argued that even though every event in connection with the offer took place in Peru, a direct effect sprang from what the Eleventh Circuit de-

scribed as "Peru's failure to make the reward payment within the United States—a sort of 'negative activity[.]'" Guevara App. A, 25a. The Eleventh Circuit observed that no federal court had ever relied on such "negative activity" to confer subject matter jurisdiction under § 1605(a)(2), and correctly rejected Guevara's argument. *See also Guirlando v. T.C. Ziraat Bankasi A.S.*, 602 F.3d 69, 76 (2nd Cir. 2010) (under FSIA, "although the failure to act may have a legally significant effect in the place where the act was to have been performed, the failure to act is not itself an act.").

Guevara's argument that he was entitled to payment in Miami fails because it is factually inaccurate, as the Eleventh Circuit found. Guevara App. A, 23a. The Emergency Decree authorized a loan and bank account in Peru for payment of the reward. *Id.* The decree requires the loan to be taken from Banco de la Nación, a state-owned bank, and describes it as an internal indebtedness operation. Nothing in the decree requires payment in the United States, or gives Guevara the power to choose the place of payment. Thus, Guevara's case is distinguished from *Weltover*, 504 U.S. at 619 (direct effect because payment due in the United States) and *Hanil Bank* v. *PT. Bank Negara Indonesia*, 148 F.3d 127, 132 (2d Cir. 1998) (direct effect when plaintiff entitled under a letter of credit to designate place of payment and it designated its New York bank account), and similar to the Second Circuit's recent decision in *Guirlando.*

Guevara argued (but abandoned) the proposition that a direct effect in the United States occurred by virtue of the single Lima-Miami telephone call in which Minister Vidal conveyed the terms of the offer to FBI Agent Longa. The Eleventh Circuit held that

Guevara's acceptance-related activity involved only this "one-off" telephone communication that was too *de minimis* to support subject matter jurisdiction, using the minimum contacts personal jurisdiction test as an analogy, as this Court did in *Weltover,* 504 U.S. at 619. Guevara App. A, 25a. The Vidal call also was in connection with law enforcement—not commercial—activities. *Id.* The participants were discussing how to bring about Montesinos' arrest, and Minister Vidal did nothing more than repeat the terms of the reward offer.

In short, the Eleventh Circuit correctly determined that no act performed by any character in this drama brought about a "direct effect" in the United States within the meaning of § 1605(a)(2) of the FSIA. This conclusion did not turn on whether any act was "legally significant," because no act, regardless of how it could be characterized, produced the requisite direct effect in the United States. No party, including Guevara, raised this issue, and the Eleventh Circuit had no occasion to consider it.

Even though the "legally significant act" test is irrelevant to the outcome of this case, Guevara evidently believes that a circuit conflict is a potential ticket to review by this Court. He therefore raises this issue for the first time in his petition, and devotes the lion's share of the petition to explication of a purported circuit conflict on this irrelevant issue.

Guevara argues that some circuits require a "legally significant act" in the United States under the direct effect clause, while others do not. He asserts that the Eleventh Circuit requires a legally significant act to occur within the United States.

Contrary to Guevara's assertions, the Eleventh Circuit does not require a legally significant act, neither within nor without the United States. In this case, the Eleventh Circuit explicitly followed this Court's articulation of the nexus rule in *Weltover*, 504 U.S. at 618, where the Court held that "an effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity." (ellipses in original). Guevara App. A, 23a. The Eleventh Circuit did not mention the legally significant act test at all, let alone the location of any such act, nor did it include or make reference to a "substantiality" or "foreseeability" requirement, which *Weltover* expressly rejected.

Here, the Eleventh Circuit adopted the sensible approach recently exemplified by the Sixth Circuit in *American Telecom Co., LLC v. Republic of Lebanon*, 501 F.3d 534 (6th Cir. 2007). Noting that some circuits adopt the legally significant act formulation, others reject it, and still others find it "helpful but not required," the Sixth Circuit said: "But, while the circuits have framed the inquiry differently, these differences have no impact here. The present case is easily resolved without resort to any legally significant act . . . ." *Id.* at 540. Like the Eleventh Circuit here, the Sixth Circuit found that the conduct alleged simply could not have had a direct effect in the United States, and dismissed the case for want of subject matter jurisdiction under the FSIA.

Notably, although the Sixth Circuit in *American Telecom* catalogued the circuits with regard to their positions on the "legally significant act" issue, it did not identify the Eleventh Circuit as yet having taken any position on the question. That agnosticism remains unchanged after the Eleventh Circuit's deci-

sion here. Even if there is a circuit conflict on this issue, the Eleventh Circuit's non-position is not in conflict with any other circuit, making this case a particularly unsuitable vehicle for resolving whatever conflict may exist.

Guevara also relies on public policy arguments, none of which are valid.

First, Guevara maintains that because the United States—like Peru—offers rewards as adjuncts to law enforcement, United States courts should compel Peru to pay him the award he contends that he has earned. Pet. 18-19. To the contrary, the SHLC, a duly constituted organ of the Peruvian government, following in good faith the procedures set out in the reward offer, and with the participation of the FBI and Guevara's attorney in the process, determined that Guevara had not earned the reward. As the United States explained in its amicus brief to the Eleventh Circuit, and as Judge Cox noted in his dissent, the courts of the United States would violate basic principles of comity if they sat in judgment on the acts of other sovereign nations in determining entitlement to reward offers. Indeed, public policy dictates precisely the opposite conclusion from that urged by Guevara. As the United States also explained in its amicus brief, if a United States court can "effectively preempt[] the . . . evaluation decision" of the Peruvian government (*Guevara II*, 608 F.3d at 1305), courts of other nations would be encouraged to "preempt the . . . evaluation decision[s]" of the United States, and order payment of rewards to claimants that the United States had determined to be unjustified.

In fact, when Guevara accepted the reward offer, he also accepted the stipulation that his entitlement

to the reward would be decided by the SHLC in Peru. Guevara is no different from a party who signs a garden-variety contract that contains a forum selection clause dictating how and where disputes under the contract will be resolved. Guevara, having accepted and participated in that process, cannot now ask a U.S. court to supplant the Peruvian tribunal whose decision Guevara agreed to respect.

Second, Guevara reverses course and argues that a reward offer is not "typical" commercial activity, and should be evaluated under some unspecified new FSIA standard "requir[ing] closer scrutiny." Pet. 21. ("This is not a typical fact pattern; this case does not involve the type of commercial activity regularly considered by the courts in determining whether an exception to the FSIA's presumed immunity applies."). Guevara cannot have it both ways: having persuaded the Eleventh Circuit in *Guevara I* that a reward offer is commercial activity potentially subject to FSIA jurisdiction, Guevara cannot in good conscience maintain in this Court that a reward offer is in some way less commercial than the activities that ordinarily fall within the exception. Indeed, if Guevara had made this concession to the Eleventh Circuit in *Guevara I*—that a reward offer is not "typical" commercial activity—this case would have been over in 2006.

Third and finally, Guevara argues that FBI Agent Currier's urging to the Peruvian government to pay the reward to Guevara exposes a "yawning conceptual gap" between the FBI and the position taken by the United States in its *amicus* brief to the Eleventh Circuit. Pet. 22. That "gap" is illusory. The FBI later disavowed Currier's statements as unauthorized. Even if the FBI had not disavowed

them, Agent Currier's letters do not contradict the considered position taken by the United States in this litigation with regard to the application of the doctrine of international comity. Agent Currier did not and could not take a legal position on this issue on behalf of the FBI.

CONCLUSION

There is no law, no equity and no public policy that would justify the district court assuming jurisdiction over Guevara's reward claim and entering judgment for Guevara. Guevara invites this Court to second-guess the decision of an organ of the Peruvian government, which is an inappropriate undertaking for a United States court. His petition should be denied.

Respectfully submitted,

MARK A. CYMROT
Counsel of Record
LEE H. SIMOWITZ
AMBIKA J. BIGGS
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Washington, DC 20036
(202) 861-1500
mcymrot@bakerlaw.com

October 22, 2010

Counsel for Respondents

APPENDIX

APPENDIX A

STATUTE LAWS

YEAR XIX - No. 7608

EMERGENCY DECREES

EMERGENCY DECREE NO. 049-2001

ESTABLISHING A FINANCIAL REWARD IN EXCHANGE FOR ACCURATE INFORMATION LEADING TO THE LOCATION AND CAPTURE OF VLADIMIRO MONTESINOS TORRES

THE PRESIDENT OF THE REPUBLIC

WHEREAS:

The authorities of the Peruvian Judiciary, the Office of the Prosecutor General and the National Police are concentrating working on prosecuting several criminal acts committed by various officials between 1990 and 2000;

Vladimiro Montesinos Torres stands out among said officials, who, during the aforementioned period held the position of Advisor in the National Intelligence System.

The aforesaid person was involved in serious crimes which affect the security of the State and society overall, in accordance with the evidence which has been obtained in special proceedings and judicial inquiries which are being conducted pursuant to Laws Nos. 27378, 27379 and 27380 on organized crime;

Therefore, a warrant for his arrest has been issued by several Courts as the alleged perpetrator of crimes against government administration, public corruption, embezzlement, crimes against persons, aggravated murder, drug trafficking, national security and others;

There is a need to adopt exceptional economic and financial measures to grant a financial reward to the person or persons who provide(s) accurate information which will enable locating and capturing Vladimiro Lenin Montesinos Torres, in accordance with the procedure set forth in this Emergency Decree;

Said measures will contribute to deciding the criminal acts under investigation, by virtue whereof there are matters of national security which justify its immediate issuance;

Exercising the authority vested under Article 118 paragraph 19) of the Peruvian Political Constitution: As approved by the Cabinet by way of a vote; and required to report to the Congress of the Republic;

DECREES:

Article 1-Financial Reward

Establish a financial reward in the amount US $5,000,000.00 (FIVE MILLION 00/100 UNITED STATES DOLLARS), which shall be given to the person or persons who provide(s) accurate information that will directly enable locating and capturing Vladimiro Lenin Montesinos Torres. In the event several persons provide the said information, the financial reward shall be divided among them.

Article 2-Special High Level Committee

Establish a Special High Level Committee in the Ministry of the Interior *[Department of Homeland Security]* for the purpose of evaluating information received and deciding on granting the financial reward. The Special High Level Committee shall consist of:

— the Secretary of Homeland Security, who will preside
— the Undersecretary of Homeland Security
— the Director General of the National Police

— the Director General of Intelligence of the Department of Homeland Security

Article 3- Accurate Information

For purposes of this Emergency Decree, accurate information shall be that [information] provided through any means to the Special High Level Committee and which enables locating and capturing Vladimiro Lenin Montesinos Torres, who is wanted.

Article 4-Use of a Pseudonym

The informant or informants may use a pseudonym, in which case the Special High Level Committee shall provide a secret code for subsequent identification upon receipt of the information in order to grant the Financial Reward.

Article 5-Protection and Safety Measures

The Special High Level Committee, in keeping with the degree of risk or danger, shall adopt the following measures for the protection and safety of the informant:

a) Police protection for the informant and his family, which may include a change of residence;

b) Withhold his identity and other personal information during proceedings.

Article 6- Secret Information

All information involving application of this Emergency Decree is secret. Any person who violates this provision, shall be administratively, civilly or criminally liable, as the case may be, in accordance with current law.

Article 7- Scope of the Financial Reward

The Department of Homeland Security shall pay the Financial Reward 24 hours after the actual

location and capture of Vladimiro Lenin Montesinos Torres. Said reward, as well as the measures for safety and protection, shall apply to nationals and foreigners.

Article 8-Government Loan

The Department of the Economy and Finance is hereby authorized to obtain a Government Loan with Banco de la Nación for up to US $5,000,000.00 (FIVE MILLION 00/100 UNITED STATES DOLLARS), earmarked for financing the issuance of the Financial Reward which is the object of the Emergency Decree; said funds shall be deposited in an account defined by the General Directorate of the Treasury for channeling to the Department of Homeland Security in the same currency as the pertinent disbursement is made.

The government loan shall be paid over a period of four (4) years, which includes a one-year (1) grace period and an option for early payment, in consecutive semi-annual installments, and if possible, in equal amounts, accruing interest at the LIBOR rate plus 3%.

Article 9- Servicing the debt

Services for pay off, interest and other expenses relating to this Government Loan shall be handled by the Department of the Economy and Finance, debited from funds provided therefore in accordance with inter-sectoral priorities and goals of the Sector in each fiscal year budget for Public Debt servicing.

Article 10- Exercise of the early payment option and charged to recoveries

The first funds recovered from the criminal acts object of this investigation, as set forth in the whereas clauses of this Emergency Decree, shall be earmarked for early pay off of the debt incurred in the Government Loan authorized in Article 8, until paid

in full, in exercise of the stipulated early payment option.

Article 11- Authorization to sign

The Secretary of the Economy and Finance or his appointee are hereby empowered to sign the loan contract, and the Director General of National Debt is also empowered to sign the other government loan documents authorized in the foregoing article.

Article 12- Schedule and payment

The National Government Budget Administration and the Public Treasury General Directorate shall schedule and draw, respectively, payable to the Department of Homeland Security section, up to the equivalent in legal tender of the amount indicated in this Emergency Decree, charged to the Supplementary Loan that shall be approved by the pertinent law and/or to the budgetary modifications on closing of Fiscal Year 2001, as stipulated in Law No. 27209, on Management of the National Budget.

Article 13-Approval

This Emergency Decree shall be approved by the Cabinet and the Secretaries of the Economy and Finance and Homeland Security.

Issued at the Government House in Lima on the sixteenth of April two thousand one.

VALENTIN PANIAGUA CORAZAO
Constitutional President of the Republic

JAVIER PÉREZ DE CUÉLLAR
Cabinet Council President

JAVIER SILVA RUETE
Secretary, Economy and Finance

ANTONIO KETIN VIDAL HERRERA
Secretary of Homeland Security

22266.

[Translator's note:] In the U.S., the Department of Homeland Security is equivalent to the Ministry of the Interior of the Republic of Peru.

CERTIFICATE OF ACCURACY

I, Esther Cecilia Crespo, an interpreter certified by the Administrative Office of the United States Courts, for and on behalf of Liaison Services, Inc., hereby certify that the foregoing translation, attached hereto and consisting of 2 page(s), is a true and accurate translation of the original document.

/s/ Esther Cecilia Crespo
Esther Cecilia Crespo
U.S. Court Interpreter • Translator

HIDALGO
Tel. 4423440
4403758
E-MAIL NOTARIA@NOTARIA-HIDALGO.COM
WWW.NOTARIA-HIDALGO.COM

ITEM	CODIGO	DESCRIPCION	UNIDAD
254	53470001	ULTRASONIDO PARA TERAPIA	UNIDAD
255	46100101	UNIDAD DE AUDIO ELECTRONICO - PANEL	UNIDAD
256	46100102	UNIDAD MULTIFILAR	UNIDAD
257	53470002	VELADOR CON LAMPARA INCANDESCENTE	UNIDAD
258	47270002	VESTIDOR DE ACERO PARA LABORATORIO	UNIDAD
259	71000002	VIDEO CAMARA PARA CONFERENCIAS	UNIDAD
260	53470003	VITRINA EXHIBICION REFRIGERADA TIPO ABIERTO	UNIDAD
261	53470004	VITRINA EXHIBICION REFRIGERADA VERTICAL	UNIDAD
262	53470005	VITRINA CALEFACTORA	UNIDAD
263	46100001	ZAPATA PORTATIL	UNIDAD

RELACION DE TIPOS DE BIENES MODIFICADOS
REFERENTE A LA DENOMINACION

ITEM	CODIGO	BIEN	MODIFICADOR
1	74222205	DUPLICADORA CON EDITOR INTELIGENTE	DUPLICADORA CON EDITOR INTELIGENTE - DUPLICADORA DIGITAL
2	43421503	MANDRILADORA	MANDRILADORA
3	45271504	SISTEMA DE PROTECCION MULTIMEDIA	SISTEMA DE PROYECCION MULTIMEDIA - PROTECTOR MULTIMEDIA

§210 16/08/2001 - D.U. N° 049-2001.- Establece Compensación Económica a cambio de información veraz que permita la ubicación y captura de Vladimiro Montesinos Torres. *(22/08/2001)*

DECRETO DE URGENCIA N° 049-2001

EL PRESIDENTE DE LA REPUBLICA

CONSIDERANDO:

Que, las autoridades del Poder Judicial, el Ministerio Público y la Policía Nacional del Perú, se encuentran abocadas al esclarecimiento de los diversos ilícitos penales en que habrían incurrido diferentes funcionarios entre los años 1990 y 2000;

Que, entre dichos funcionarios destaca la persona de Vladimiro Lenin Montesinos Torres, que en el período establecido ejerció el cargo de Asesor en el Sistema de Inteligencia Nacional;

Que, la persona antes indicada estaría incursa en graves delitos que afectan la seguridad del Estado y a la sociedad en su conjunto, conforme a las evidencias que se vienen obteniendo en los procedimientos especiales e investigaciones judiciales que se llevan a cabo en aplicación de las Leyes N°s. 27378 [T.295,§154], 27379 [T.295,§155] y 27380 [T.295,§156] relativos a la criminalidad organizada;

Que, por tal motivo se encuentra requisitoriado por diferentes Juzgados, por ser presunto autor de delitos contra la Administración Pública, Corrupción de Funcionarios, Peculado, Contra la Vida, el Cuerpo y la Salud, Homicidio Calificado, Homicidio Agravado, Tráfico Ilícito de Drogas, Contra la Seguridad y otros;

Que, resulta necesario adoptar medidas excepcionales en materia económica y financiera para el otorgamiento de una compensación económica a favor de la persona o personas que proporcionen información veraz que permita la ubicación y captura de Vladimiro Lenin Montesinos Torres, de conformidad con el procedimiento que el presente Decreto de Urgencia establece;

Que, dichas medidas contribuirán con el esclarecimiento de los ilícitos penales que se encuentran en investigación en virtud de la cual existen razones de interés nacional que justifican su expedición en forma inmediata;

En uso de las facultades conferidas en el inciso 19) el Artículo 118° de la Constitución Política del Perú [T.211,§213];

Con el voto aprobatorio del Consejo de Ministros; y,

Con cargo de dar cuenta al Congreso de la República;

DECRETA:

Artículo 1°.- Compensación Económica

Establézcase una Compensación Económica ascendente a la suma de US$ 5 000 000,00 (CINCO MILLONES Y 00/100 DOLARES AMERICANOS), que será otorgada a la persona que proporcione información veraz que permita en forma directa la ubicación y captura de Vladimiro Lenin Montesinos Torres. Tratándose de varias personas que proporcionen dicha información, la compensación económica será distribuida entre éstas.

Artículo 2°.- Comisión Especial de Alto Nivel

Constituyase en el Ministerio del Interior una Comisión Especial de Alto Nivel con la finalidad de evaluar la información recibida y decidir el otorgamiento de la Compensación Económica. La Comisión Especial de Alto Nivel estará conformada por:

- Ministro del Interior, quien lo presidirá
- Viceministro del Interior.
- Director General de la Policía Nacional
- Director General de Inteligencia del Ministerio del Interior

Artículo 3°.- Información Veraz.

Para los efectos del presente Decreto de Urgencia se considera información veraz la que se proporcione por cualquier medio a la Comisión Especial de Alto Nivel, y que posibilite la ubicación y captura del requisitoriado Vladimiro Lenin Montesinos Torres.

Artículo 4°.- Uso de Seudónimo

El informante o los informantes podrán usar un seudónimo, en cuyo caso la Comisión Especial de Alto Nivel a la recepción de la información le asignará un código secreto que permita su posterior identificación para efecto del otorgamiento de la Compensación Económica.

Artículo 5°.- Medidas de Protección y Seguridad

La Comisión Especial de Alto Nivel, según el grado de riesgo o peligro, adoptará las siguientes medidas de protección y seguridad del informante:

a) Protección policial para el informante y su familia, que puede incluir el cambio de residencia.

b) Reserva de su identidad y demás datos personales en las diligencias que se practiquen.

Case 1:04-cv-23223-MGC Document 119-2 Entered on FLSD Docket 04/14/2008 Page 8 of 9

LES Cancelas Ing. Sandro
Central Telef. 4472141
Telefax 4405798
E-MAIL NOTARIA@NOTARIAHIDALGO.COM
Pagina Web www.notariahidalgo.com

Artículo 6°.- Información de Carácter Secreto

Toda información relacionada con la aplicación del presente Decreto de Urgencia tiene el carácter de secreto. Los que infrinjan esta disposición, incurren en responsabilidad administrativa, civil y/o penal, según corresponda, de conformidad con lo establecido en la legislación vigente.

Artículo 7°.- Alcance de la Compensación Económica

El Ministerio del Interior hará efectiva la Compensación Económica a las 24 horas de producción la ubicación y captura de Vladimiro Lenin Montesinos Torres. Dicha compensación así como las medidas de protección y seguridad, alcanzan a nacionales y extranjeros.

Artículo 8°.- Operación de Endeudamiento Interno

Autorízase al Ministerio de Economía y Finanzas a concertar una Operación de Endeudamiento Interno con el Banco de la Nación hasta por la suma de US$ 5 000 000,00 (CINCO MILLONES Y 00/100 DOLARES AMERICANOS), destinada a financiar el otorgamiento de la Compensación Económica a que se refiere el presente Decreto de Urgencia, dichos recursos serán depositados en una cuenta que para el efecto determine la Dirección General del Tesoro Público para su canalización a favor del Ministerio del Interior en la misma moneda en que se efectúe el desembolso correspondiente.

La operación de Endeudamiento Interno será cancelada en un plazo de cuatro (4) años, que incluye un (1) año de gracia, mediante cuotas semestrales consecutivas y en lo posible iguales, devengando una tasa de interés anual de Libor más un margen adicional de 3%, con opción de prepago.

Artículo 9°.- Servicio de la Deuda

El servicio de amortización, intereses y demás gastos que ocasione la presente operación de Endeudamiento Interno serán atendidos por el Ministerio de Economía y Finanzas, con cargo a los recursos que en función de las prioridades intersectoriales y metas del Sector le correspondan en cada Ejercicio Presupuestal para el servicio de la Deuda Pública.

Artículo 10°.- Ejercicio de la opción de prepago con cargo a recuperaciones

Las primeras recuperaciones de los recursos provenientes de los ilícitos penales materia de investigación señalados en la parte considerativa del presente Decreto de Urgencia serán destinadas a prepagar la deuda derivada de la operación de Endeudamiento Interno que autoriza el Artículo 8° hasta su cancelación total, en ejercicio de la opción de prepago establecida.

Artículo 11°.- Autorización de Suscripción

Autorízase al Ministro de Economía y Finanzas o a quien él designe, a suscribir el contrato de préstamo, así como al Director General de Crédito Público a suscribir los demás documentos de la operación de financiamiento interno que se autoriza en el artículo precedente.

Artículo 12°.- Calendarización y pago

La Dirección General del Presupuesto Público y la Dirección General del Tesoro Público calendarizarán y girarán, respectivamente, a favor del Pliego Ministerio del Interior hasta por el equivalente en moneda nacional del monto a que se refiere el presente Decreto de Urgencia, con cargo al Crédito Suplementario que se apruebe vía la norma legal pertinente y/o con cargo a las modificaciones presupuestarias al cierre del Año Fiscal 2001, dentro del marco de lo establecido en la Ley N° 27209 [T.283,§030], Ley de Gestión Presupuestaria del Estado.

Artículo 13.- Refrendo

El presente Decreto de Urgencia será refrendado por el Presidente del Consejo de Ministros y los Ministros de Economía y Finanzas y del Interior.

Dado en la Casa de Gobierno, en Lima, a los dieciséis días del mes de abril del año dos mil uno.

VALENTIN PANIAGUA CORAZAO, Presidente Constitucional de la República
JAVIER PEREZ DE CUELLAR YRIARTE, Presidente del Consejo de Ministros
JAVIER SILVA RUETE, Ministro de Economía y Finanzas
ANTONIO KELLY VIDAL BAZAN, Ministro del Interior

§211 20/04/2001 - D.U. N° 050-2001 **Amplía los alcances del Decreto de Urgencia N° 077-2000 que dispuso la transferencia a terceros de carteras de crédito de entidades del Sector Público encargadas a la Comisión Administradora de Carteras** *(22/04/2001)*

DECRETO DE URGENCIA N° 050-2001

SE AMPLIA LOS ALCANCES DEL DECRETO DE URGENCIA N° 077-2000

EL PRESIDENTE DE LA REPUBLICA

CONSIDERANDO:

Que mediante el Decreto de Urgencia N° 077-2000 [T.292,§119] se dispuso que la transferencia a terceros de las carteras de crédito de entidades del Sector Público encargadas a la Comisión Administradora de Carteras - CAC, estará a cargo de un Comité Especial de Privatización, el mismo que se constituyó mediante Resolución Suprema N° 435-2000-PCM;

Que, es necesario extender este tratamiento a otras carteras de crédito, permitiendo optimizar su gestión y recuperación;

Que, por tratarse de una medida de materia económica y financiera que permitirá un manejo eficiente de las finanzas públicas, existen razones de interés nacional que justifican su expedición en forma inmediata;

En uso de las facultades conferidas por el inciso 19) del Artículo 118° de la Constitución Política del Perú [T.211,§215];

CECILIA FRANCO
NOTARIA

CERTIFICO: QUE ESTA COPIA FOTOSTATICA ES IDENTICA A LA AMPLIACION DE SU ORIGINAL, EL CUAL HE TENIDO A LA VISTA, Y AL QUE ME REMITO EN CASO NECESARIO

LIMA, ... DE 01 ABR. 2008 DE .....

COLEGIO DE NOTARIOS DE LIMA

CECILIA HIDALGO MORAN
Notaria de Lima

JOSE L. MONTOYA VERA; SECRETARIO DEL COLEGIO DE NOTARIOS DE LIMA. CERTIFICA. Que la firma y sellos que anteceden en esta foja corresponden al (la) Notario (a) de Lima

Cecilia Hidalgo Moran

Comprobante N° 39242 Fecha: 04/04/2008

El Secretario certifica la firma del Notario mas no el contenido

COLEGIO DE NOTARIOS DE LIMA PERU

José L. Montoya Vera
SECRETARIO

MINISTERIO DE RELACIONES EXTERIORES
DIRECCION GENERAL DE ASUNTOS CONSULARES
Legalización N° 227810
Se legaliza la firma precedente del Sello
José L. Montoya Vera
SIN JUZGAR EL CONTENIDO DEL DOCUMENTO

Julia Adela Moreano de Dueñas
Departamento de Legalizaciones
Dirección de Fedatario Consulares

LIMA 09 ABR. 2008

Republic of Peru)
Province and City of Lima) ss:
Embassy Of the)
United States of America)

I certify that the official named below, whose true signature and official seal are, respectively, subscribed and affixed to the annexed document, was, on this day, empowered to act in the official capacity designated in the annexed document, to which faith and credit are due:

JULIA ADELA MOREANO DE DUENAS

This Embassy assumes no responsibility for the contents of the attached document.

/s/ JAMARI SALLEH
JAMARI SALLEH
Consul U.S. Embassy
Lima, Peru

April 10, 2008
Date

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

[Filed Aug. 15, 2008]

Case No. : 04-23223-CIV-COOKE/BANDSTRA

JOSE GUEVARA,

Plaintiff,

v.

REPUBLICA DEL PERU, MINISTERIO DEL INTERIOR DEL PERU, ANTONIO KETINVIDAL, and FERNANDO ROSPIGLIOSI,

Defendants.

FEDERAL BUREAU OF INVESTIGATION'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL COMPLIANCE WITH TRIAL SUBPOENAS

The United States Department of Justice, Federal Bureau of Investigation (the "FBI"), through the undersigned Assistant United States Attorney, responds to Plaintiff, Jose Guevara's "Motion to Compel Compliance with Trial Subpoenas or . . . to Perpetuate Testimony . . ." of Special Agents Kevin Currier and Waldo Longa as follows:

INTRODUCTION

Plaintiff Jose Guevara is suing Defendants Peru, *et al.*, to collect a $5 million reward Defendants allegedly offered for information leading to the capture and

arrest of an international fugitive, Vladimir Lenin Montesinos. Plaintiff has issued subpoenas for testimony at trial by FBI Special Agents Kevin Currier and Waldo Longa. Those Agents were involved in the FBI's search for Montesinos in late 2000 and 2001. Plaintiff alleges that, in response to a promise from the government of Peru which was communicated to him by the Special Agents, he provided information which led to Montesino's capture. Plaintiff seeks to elicit testimony from the Agents about "the specific facts leading up [to] the offer and acceptance by [Plaintiff] of the $5 million reward . . .". MOTION TO COMPEL, p.3.

Pursuant to the Federal Housekeeping Statute, 5 U.S.C. § 301, and the Supreme Court's decision in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951),[1] the Department of Justice treated the trial subpoenas issued to Special Agents Currier and Longa as requests for testimony under the DOJ's *Touhy* regulations at 28 C.F.R. § 16.21 *et seq*. As explained to Plaintiff after careful and thorough deliberation, the DOJ concluded that testimony concerning the FBI's search for Montesinos would necessarily reveal the FBI's theories in that case, its investigative sources and methods, and the identities of witnesses. The DOJ expressed its concern that the testimony sought would thus compromise ongoing

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[1] In *Touhy*, the Court upheld the authority of the Attorney General to prescribe regulations for the custody, use, and preservation of DOJ records. 340 U.S. at 468. As the Court noted, "[w]hen one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed, the necessity, of centralizing determination as to whether subpoenas *duces tecum* will be willingly obeyed or challenged is obvious." *Id*.

and future FBI investigations—a potential harm to the public which outweighed Plaintiff's need for the testimony in the prosecution of this civil lawsuit. The DOJ also determined that testimony sought implicated other common law and statutory privileges or bars on disclosure. For all of these reasons, the DOJ elected not to authorize the requested testimony.

The DOJ's denial of Plaintiff's requests for Agents Currier and Longa's testimony is subject to review under the Administrative Procedure Act (the "APA"), 5 U.S.C. § 701, *et seq.*, not Rule 45 of the Federal Rules of Civil Procedure. The APA requires that a court defer to an agency's decision so long as the decision was not arbitrary or capricious. As demonstrated below, the DOJ's decision in this case was neither arbitrary nor capricious. The Court should therefore defer to the DOJ's denial of Plaintiffs' requests for the Special Agents' testimony at trial and deny Plaintiff's Motion to Compel

ARGUMENT

I. The DOJ's Decision To Deny Authorization for Special Agents Currier and Longa's Testimony Must Be Upheld Because it Was Not Arbitrary, Capricious, an Abuse of Discretion, or Otherwise Not in Accordance With Law

"[A] federal employee may not be compelled to obey a subpoena contrary to his federal employer's instructions under valid agency regulations." *Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1197 (11th Cir.1991) (quoting *Boron Oil Co. v. Downie*, 873 F.2d 67, 73 (4th Cir.1989)). The DOJ's *Touhy* regulations require that, in deciding whether to authorize an employee to testify in response to a subpoena, the DOJ official should consider "[w]hether such disclosure is

appropriate under the rules of procedure governing the case or matter in which the demand arose," and "[w]hether disclosure is appropriate under the relevant substantive law concerning privilege." 28 C.F.R. § 16.26(a). Among other things, the DOJ's *Touhy* regulations prohibit the disclosure of information that "would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection," or "would reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired." *Id.* at § 16.26(b)(4), (b)(5).

The DOJ's decision not to permit the testimony of Special Agents Currier and Longa is a final agency action reviewable under the Administrative Procedure Act. *See* 5 U.S.C. § 704; *see also Moore*, 927 F.2d at 1197. The Court may not overturn the DOJ's decision unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see also Moore*, 927 F.2d at 1197. "To determine whether an agency decision was arbitrary and capricious, the reviewing court 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" *N. Buckhead Civic Ass'n v. Skinner*, 903 F.2d 1533, 1538 (11th Cir.1990) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989)).

The DOJ based its denial of Plaintiff's request for testimony from Special Agents Currier and Longa upon careful and thorough consideration of its law enforcement interests and Plaintiff's need for the

testimony. As noted above, the DOJ's *Touhy* regulations prohibit the disclosure of information that "would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired[.]" 28 C.F.R. § 16.26(b)(5). Where a disclosure would result in such harm, the DOJ cannot authorize such disclosure unless it determines that "the administration of justice requires disclosure." *Id.* § 16.26(c).

Applying the foregoing standard, the DOJ concluded that authorizing the testimony of Special Agents Currier and Longa would disclose certain investigatory procedures and techniques, thereby impairing their effectiveness in other investigations. Regardless of how it is characterized in the Motion to Compel, the testimony Plaintiff seeks to elicit from the Special Agents concerns the methods the FBI used in its search for Vladimir Montesinos. Essentially, Plaintiff seeks to elicit testimony that the Special Agents sought permission from the Peruvian government to convey an offer of reward to Plaintiff, that the Agents received such permission, that the Agents conveyed Peru's reward offer to Plaintiff, and that Plaintiff provided the information that led to Montesinos' capture.[2] Indeed, in the relevancy statement he submitted to DOJ in support of his trial subpoenas, Plaintiff noted that Special Agent Currier would testify about his formulation of a plan for the capture

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[2] Presumably, the testimony Plaintiff seeks to elicit from the two Special Agents mirrors the substance of the "Declaration of Kevin Currier" attached to the Motion to Compel. That Declaration and the disclosures made therein were not authorized by the DOJ and do not constitute an official statement of the FBI or a waiver of the rights and privileges asserted by the DOJ herein.

of Montesinos, his meeting and discussions with Peruvian officials for that purpose, and his communications with other FBI agents about the case. Such testimony would reveal in open court exactly how the FBI conducted its investigation and search for Montesinos. That is precisely the kind of disclosure the DOJ's *Touhy* regulations prohibit absent a finding that "the administration of justice requires disclosure." *Id.* § 16.26(c).

The term "administration of justice" refers to the government's role in "administ[ering]" its law enforcement duties through, for example, "pursu[it] [of] a civil or criminal prosecution or affirmative relief, such as an injunction." 28 C.F.R. 16.26(c). Assisting Plaintiff's efforts to collect on a foreign government's offer of a reward for the capture of a fugitive does not fit within any understanding of DOJ's duties to administer justice, or anything "require[d]" by those duties. The DOJ, therefore, concluded that disclosure was not required for the administration of justice and denied Plaintiff's requests for the Special Agents' testimony at trial.

II. Special Agent Currier is located More 100 Miles Outside of the Court's Jurisdiction

In addition to the reasons set forth above, the Court should decline to compel the testimony of Special Agent Currier at trial because, as Plaintiff concedes in his Motion, Agent Currier is located in Caracas, Venezuela—more than 100 miles outside of the Southern District of Florida—and, therefore outside the Court's jurisdiction to compel his attendance at trial. *See* Rule 45, Federal Rules of Civil Procedure.

CONCLUSION

For all of the foregoing reasons, Plaintiff's Motion to Compel the requested testimony should be denied.

Dated: August 15, 2008

Respectfully Submitted,

R. ALEXANDER ACOSTA
United States Attorney

By

/s/ Carlos J. Raurell
Carlos J. Raurell

Assistant United States Attorney
Florida Bar No. 529893
99 Northeast 4th Street
Miami, Florida 33132
Telephone: (305) 961-9243
Fax: (305) 530-7139
E-Mail: carlos.raurell@usdoj.gov

Counsel for the Department of Justice, Federal Bureau of Investigation

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2008, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ CARLOS RAURELL
CARLOS RAURELL
Assistant United States Attorney

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-17213

JOSE GUEVARA,
Plaintiff-Appellee-Cross-Appellant,

LUIS ALFREDO PERCOVICH,
Intervenor-Appellant,

v.

REPUBLICA DEL PERU and
MINISTERIO DEL INTERIOR DEL PERU,
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF REPUBLICA DEL PERU

HAROLD HONGJU KOH
Legal Adviser
U.S. Department of State
2201 C Street N.W.
Washington, D.C. 20520

TONY WEST
Assistant Attorney General

JEFFREY H. SLOMAN
Acting United States Attorney

DOUGLAS N. LETTER
(202) 514-3602
NICHOLAS BAGLEY
(202) 514-2498
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, to the best of his knowledge, the following persons, in addition to those listed in appellant's and appellee's opening briefs, are the only ones who may have an interest in the outcome of this case:

Nicholas Bagley, Attorney, U.S. Department of Justice;

Harold Hongju Koh, Legal Adviser, U.S. Department of State;

Douglas N. Letter, Attorney, U.S. Department of Justice;

Jeffrey H. Sloman, Acting United States Attorney;

Tony West, Assistant Attorney General, U.S. Department of Justice.

/s/ NICHOLAS BAGLEY

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS

STATEMENT REGARDING ORAL ARGUMENT

INTEREST OF THE UNITED STATES. 1

STATEMENT OF THE CASE. 6

I. Factual Background. 6

II. Judicial Proceedings in the United States. 9

SUMMARY OF ARGUMENT. 12

ARGUMENT 14

I. International Comity and the Act of State Doctrine Require Reversal of the District Court's Judgment Against Peru 14

A. International Comity 15

B. Act of State Doctrine 26

C. Forfeiture. 30

II. This Court Need Not Resolve Whether Peru's Reward Offer Had a Sufficient Commercial Nexus to the United States ... 32

CONCLUSION 35

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Cases: Page

Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) 12, 26, 31

Chalabi v. Hashemite Kingdom of Jordan, 543 F.3d 725 (D.C. Cir. 2008) 33, 34

Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355 (11th Cir. 1984) 30, 31

F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004) 15

Fortino v. Quasar Co., 950 F.2d 389 (7th Cir. 1991) 31

Glen v. Club Mediterranee, S.A., 450 F.3d 1251 (11th Cir. 2006) 28

Granberry v. Greer, 481 U.S. 129 (1987) 32

Guevara v. Republica del Peru, 468 F.3d 1289 (11th Cir. 2006) 6, 10

Harris v. United States, 149 F.3d 1304 (11th Cir. 1998) 32

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 15

Hilton v. Guyot, 159 U.S. 113 (1895) 15, 26

Honduras Aircraft Registry, Ltd. v. Honduras, 129 F.3d 543 (11th Cir. 1997) 28

Horowitz v. United States, 267 U.S. 458 (1925) 29

International Association of Machinists v. OPEC, 649 F.2d 1354 (9th Cir. 1981) 28

Pravin Banker Associates, Ltd. v. Banco Popular Del Peru, 109 F.3d 850 (2d Cir. 1997) 31

Republic of Argentina v. Weltover, Inc., 504 U.S. 607 (1992) 29

Society of Lloyd's v. Siemon-Netto, 457 F.3d 94 (D.C. Cir. 2006) 29

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 33

Tenet v. Doe, 544 U.S. 1 (2005) 22, 34

Underhill v. Hernandez, 168 U.S. 250 (1897) 28

Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227 (11th Cir. 2004) 16, 19, 20

Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709 (2d Cir.1987). 16

W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l, 493 U.S. 400 (1990) 26, 28

Statutes:

5 U.S.C. § 552. 22

10 U.S.C. § 127b 23

22 U.S.C. § 2708 ..... 22, 23

28 U.S.C. § 517. 1

28 U.S.C. § 1604 10

28 U.S.C. § 1605 ..... 10, 33

Rules:

Fed. R. App. P. 29(a) 1

Other Authorities:

Clifford Krauss, *Former Spy Chief of Peru Captured in Venezuela Lair*, N.Y. Times, June 25, 2001 21

STATEMENT REGARDING ORAL ARGUMENT

Because the panel already heard oral argument from the parties on January 13, 2010, the United States does not request oral argument. Should the Court schedule a second oral argument in the case, the United States believes that its participation would be useful to the Court and would request ten minutes of argument time.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOSE GUEVARA,
Plaintiff-Appellee-Cross-Appellant,

LUIS ALFREDO PERCOVICH,
Intervenor-Appellant,

v.

REPUBLICA DEL PERU and
MINISTERIO DEL INTERIOR DEL PERU,
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PERU

INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Fed. R. App. P. 29(a), the United States files this *amicus curiae* brief in order to urge the Court to reverse the district court's judgment against the Republic of Peru under either international comity principles or the act of state doctrine. These justiciability doctrines are fully applicable here and foreclosed the district court from

issuing an $8.2 million judgment against Peru that overrode the decisions of high-level Peruvian government officials made in connection with the apprehension of a corrupt former Peruvian intelligence chief who had been hiding in Venezuela.

The district court's substantial judgment against Peru would, if affirmed, become a serious irritant in the United States' bilateral relationship with that nation. The judgment represents a serious affront to Peruvian sovereignty and is precisely the type of ruling that a United States court should not make because it hamstrings the Executive Branch's ability to carry out its foreign-relations responsibilities. Reversal under these circumstances is entirely consistent with precedent from the Supreme Court, this Court, and its sister Circuits applying the international comity and act of state doctrines.

We have taken the highly unusual step of filing an *amicus* brief after oral argument because the federal government has a profound interest in preventing the district court's judgment from undermining our nation's relationship with a stable democratic partner in South America. Moreover, the United States operates its own highly successful international reward programs, and the judgment here raises the troubling specter of foreign courts overriding decisions made by U.S. law enforcement and diplomatic officials.

As discussed below, this case arose because the President of Peru issued a formal executive decree offering a $5 million reward for information leading directly to the capture of Vladimiro Lenin Montesinos Torres, the former head of Peru's intelligence agency. The Peruvian President established a Special Committee of high-ranking officials within the Peruvian Interior Ministry to implement this reward program.

The committee was vested with exclusive authority to issue the reward, and provision was made for the committee to operate confidentially. In addition, the committee was empowered by the Peruvian President to make determinations concerning competing claims to the reward, and to decide how the available funds should be divided if more than one claimant qualified for compensation.

Plaintiff-appellee Jose Guevara was a Venezuelan intelligence official who offered information relating to Montesinos' whereabouts while in the temporary custody of the FBI as part of a federal criminal investigation of his conduct. Guevara provided this information while in the United States on a short trip. Not long after, he filed a claim in Peru for the $5 million reward.

The Peruvian Special Committee rejected Guevara's claim, reasoning that Venezuelan authorities had taken Montesinos into custody and that no evidence connected Guevara's information with those authorities. Guevara is now pursuing his claim against Peru in a United States court.

Notwithstanding the Peruvian government's authoritative resolution of Guevara's claims, the district court here ruled that the Special Committee's determination was incorrect and that Peru must therefore pay Guevara the entire $5 million reward, plus $3.2 million in interest. This ruling sets aside two Peruvian government decisions: (1) the conferral of exclusive authority on the Special Committee to administer the reward program; and (2) that committee's ultimate conclusion that Guevara had not demonstrated his entitlement to the reward.

The adjudication in a United States court of the validity of a sovereign determination by a foreign administrative tribunal is precisely what the international comity and act of state doctrines are meant to avoid. And, as alluded to already, the district court's judgment exposes actions taken by the United States in implementing parallel reward programs to reversal by foreign courts. This type of foreign court ruling would be especially problematic because U.S. officials make reward decisions on the basis of competing considerations such as the nature, quality, and accuracy of the information provided; how that information ties in with confidential information that the United States already had; the degree to which the information actually assisted the government; the need to protect sensitive sources and methods; the effect of payment on our national security interests; and whether non-payment would undermine the effectiveness of the program. Foreign judicial pronouncements on governmental decisions made by U.S. officials concerning these factors would obviously be inappropriate and unwelcome.

Thus, drawing either on principles of international comity or on the act of state doctrine, this Court should reverse the judgment against Peru. This Court should do so as an exercise of its discretion, whether or not Peru presented these arguments adequately to the district court. Full and proper application of these principles is of immense importance to the interests of the United States, and those interests should override any procedural problems created by Peru's litigation strategy.

STATEMENT OF THE CASE

In this brief, except where otherwise expressly noted, the United States takes the description of the

facts purely from Guevara's complaint, this Court's opinion in *Guevara v. Republica del Peru*, 468 F.3d 1289 (11th Cir. 2006), and the uncontested facts described in the district court record.

I. Factual Background.

During the 1990s, Vladimiro Lenin Montesinos Torres served as an adviser to Peruvian President Alberto Fujimori and as the head of Peru's National Intelligence System. In that capacity, Montesinos allegedly committed numerous crimes, including (but not limited to) bribery, influence peddling, drug trafficking, money laundering, unlawful arms trafficking, and murder. He was caught on videotape offering a bribe to a legislator-elect in September 2000, which led almost immediately to the collapse of the Fujimori government.

Montesinos went into hiding and an international manhunt ensued. In April 2001, the President of Peru issued an Emergency Decree offering a $5 million reward to "the person or persons who provide(s) accurate information that will directly enable locating and capturing" Montesinos. DE 119-2, at 2 (Emergency Decree).[1] The decree established a Special High Level Committee within the Peruvian Ministry of the Interior "for the purpose of evaluating information received and deciding on granting the financial reward." *Id.* And "accurate information" was defined to mean information "provided through any means to the Special High Level Committee and which enables locating and capturing" Montesinos. *Id.* The four-person committee was made up of the Minister of the Interior, his immediate subordinate, the Director

[1] "DE" refers to the docket entry number on the district court docket.

General of the National Police, and the Director General of Intelligence for the Interior Ministry. *Id.* "In the event several persons provide the said information," the decree provides, "the financial reward shall be divided among them." *Id.* The Special Committee was charged with taking "measures for the protection and safety of the informant"; consistent with that need for confidentiality, "[a]ll information involving application of this Emergency Decree is secret." *Id.* at 2-3.

In the meantime, Montesinos had secretly taken refuge in Venezeula. A member of the Venezuelan intelligence service, plaintiff-appellee Jose Guevara, provided Montesinos with a safe house and a security detail. As he ran short on money, Montesinos "sent Guevara on trips to Lima, Bogota, Miami, and Nassau, Bahamas, in a desperate search for more money." DE 333, at 3. On Guevara's third such trip to Miami in June 2001 to meet with an employee at a Miami bank on Montesinos' behalf, the FBI took Guevara into custody.

According to Peru, Guevara was "charged with fraud against the United States and extortion of the family of a bank official * * * in an effort to access $43 million of Montesinos' deposits at a Miami bank." Appellant's Br. 3. The FBI told Guevara that the case in the United States would be dropped if he provided information concerning Montesinos' whereabouts. The FBI agents in Miami consulted over the telephone with a Peruvian official, who confirmed that a $5 million reward for information leading to Montesinos' capture was available to Guevara. *See* DE 230, at 3. In light of his discussions with the FBI and Peru's reward program, Guevara decided to cooperate, and he placed a telephone call to a colleague in Venezuela.

Id. Montesinos was arrested the following day by Venezuelan authorities. *Id.*

Guevara then sought to collect the reward in Peru. In 2002, the Peruvian government's Special Committee agreed to process Guevara's request for the reward. Guevara was not the only claimant, however: a handful of others—including the bank employee with whom Guevara met in Miami—also submitted claims.

In 2005, the Special Committee notified Guevara that his request for the reward had been denied. DE 201-9. The Peruvian government did not in its notice provide an explanation for its decision; Peru instead informed Guevara that, pursuant to the terms of the Emergency Decree, that information was considered confidential. Guevara was nevertheless invited "to read the Resolution related to your request" at a Peruvian ministry office. *Id.* In a declaration submitted to the district court, a former Peruvian Minister of the Interior and member of the Special Committee explained that Guevara's reward claim had been rejected because "the acts of the Venezuelan military were an intervening event that broke the chain of causation" between Guevara's assistance and Montesinos' capture. Costa Decl., DE 326-4 ¶16; *see also* Rospigliosi Dep., DE 201-3, at 21.

II. Judicial Proceedings in the United States.

In 2004, Guevara filed a breach-of-contract action in a Florida state court against Peru to recover the $5 million reward. The case was removed to the United States District Court for the Southern District of Florida, which concluded that Peru was immune from suit under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1604, 1605. In the district court's view, offering a reward for the capture of a criminal

was a sovereign, and not a commercial, act. (Shortly before the district court issued its decision, the Venezuelan Supreme Court of Justice had rejected a separate claimant's suit effort to sue Peru for the reward in Venezuela on the similar ground that the Peruvian President's issuance of the Emergency Decree was a sovereign act not subject to challenge in Venezuelan courts. *See* Decision of February 17, 2004 (available at http://www.tsj.gov.ve/decisiones/jspa/Febrero/03-1314.htm)).

This Court reversed in November 2006. *Guevara v. Republica del Peru*, 468 F.3d 1289 (11th Cir. 2006). The Court found that Peru's reward offer was a unilateral offer to enter into a contractual relationship. And under the FSIA, this Court held, a contract for the provision of information is a commercial contract and is not inherently sovereign. The case was therefore remanded for further proceedings.

On remand, the district court granted summary judgment against Peru. In the court's view, the Special Committee's 2002 resolution indicating that Guevara's claim had been accepted for consideration established that Guevara had, in fact, provided information that led directly to Montesinos' capture. DE 230, at 6-7. The court rejected Peru's argument that the capture of Montesinos by Venezuelan authorities, and not by Peruvian authorities, raised an issue of fact as to whether Guevara's provision of information had led directly to Montesinos' arrest. "In the absence of evidence to the contrary, it appears that Venezuela learned of Montesinos's location from Guevara and would have been unable to capture him had Guevara not cooperated." *Id.* at 8. The court also rejected Peru's evidence regarding the Special Committee's deliberations, and it closed its analysis by

criticizing the secrecy of the proceedings, discounting for that reason the significance of Peru's formal letter rejecting Guevara's claim. *Id.* at 9-10.

The district court subsequently entered final judgment against Peru. Under that judgment, the court ordered Peru to pay Guevara the entirety of the $5 million reward, plus more than $3.2 million in prejudgment interest. DE 346. Peru appealed. DE 349. In its opening appellate brief to this Court, Peru argues, among other things, that international comity and the act of state doctrine should have prevented the district court from entering a judgment against Peru contradicting the decision by the Peruvian government that Guevara was not entitled to payment of the reward. Appellant's Br. 40-42.

SUMMARY OF ARGUMENT

In practical effect, Jose Guevara's lawsuit against the Peruvian government in the United States is both a collateral attack in another nation's courts on the Special Committee's decision that he was not entitled to the reward and a challenge to the authority of the Peruvian President to delegate to the Special Committee the exclusive authority to administer the reward program. Not only would the district court's order requiring the Peruvian government to pay the reward violate the act of state doctrine, which the Supreme Court has held to have "constitutional underpinnings." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964). It would also, if affirmed, introduce considerable friction into the United States' bilateral relationship with Peru. To protect the prerogatives of the Executive Branch in its conduct of foreign affairs, both the act of state doctrine and principles of international comity generally preclude U.S. courts from reviewing and overriding the

sovereign decisions of foreign states and foreign tribunals. Particularly because this judgment against Peru presents two serious foreign-relations dilemmas for the United States, the doctrines are fully applicable here.

First, the district court's entry of a multi-million djudgment against Peru would, if affirmed, become an irritant in the United States' relationship with that country. Peru justifiably believes that the district court overstepped its authority when it overrode the authoritative decision of the Special Committee denying Guevara's claim for the reward. Second, the United States itself administers several reward programs for the capture of international fugitives. To preserve the ability of U.S. officials to make delicate and context-sensitive judgments about whether an individual is or is not entitled to a reward, decisions made pursuant to those reward programs are generally not subject to judicial review even in domestic courts. Yet the district court's judgment stands as an invitation to *foreign* courts to accept jurisdiction over litigation challenging decisions by U.S. officials concerning reward claims. The threat of oversight by foreign courts would not only seriously hamper the administration of these important reward programs; it would also present the risk that foreign courts will demand the release of confidential information relating to ongoing law enforcement investigations—or even order the U.S. to disclose classified information.

The United States therefore urges this Court to reverse the judgment against Peru on the ground that it accords neither with international comity nor with the act of state doctrine. We recognize that Peru has argued in the alternative that its commercial activity lacked a sufficient nexus to the United States

to fall within the commercial activity exception. Because resolving the nexus argument in this very unusual case could have far-reaching implications for future litigation, we ask the Court to reverse the judgment on international comity and act of state grounds, which themselves render the suit non-justiciable.

ARGUMENT

I. International Comity and the Act of State Doctrine Require Reversal of the District Court's Judgment Against Peru.

As explained above, a high-level committee within the Peruvian government vested with the exclusive authority to administer a $5 million reward for information leading directly to Montesinos' capture considered and rejected Guevara's claim for that reward. In nonetheless ordering Peru to pay Guevara the entirety of the $5 million reward, plus millions in interest, the district court contradicted the determination of a foreign tribunal and arrogated to itself authority that the President of Peru had delegated to that tribunal. As we explain below, principles of international comity demanded that the district court abstain from overriding the decision of the Special Committee to reject Guevara's claim for the reward. And the act of state doctrine prohibited the district court from invalidating the Peruvian President's establishment of an exclusive mechanism for administering the reward.

A. International Comity.

"International comity"—"the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation," *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)—has two forms. Pre-

scriptive comity (also called the "comity of nations") is a doctrine under which courts construe "ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). The second form—at issue in this case—is the "comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). Although the comity of courts is an abstention doctrine that is typically invoked when a U.S. court declines to exercise jurisdiction in deference to parallel judicial proceedings in a foreign state, *see Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713-14 (2d Cir.1987), it applies equally in cases involving the decisions of foreign administrative tribunals. *See Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237-40 (11th Cir. 2004) (finding that international comity required dismissal of domestic claims in deference to the compensation determinations of a foreign administrative tribunal).

In deciding whether to defer on comity grounds to the decision of a foreign tribunal, this Court weighs at least four factors: "(1) whether the foreign court was competent and used 'proceedings consistent with civilized jurisprudence,' (2) whether the judgment was rendered by fraud, * * * (3) whether the foreign judgment was prejudicial because it violated American public policy notions of what is decent and just"; and (4) "whether the central issue in dispute is a matter of foreign law and whether there is a prospect of conflicting judgments." *Id.* at 1238. The strength of the United States' interests and the interests of the foreign state are also important to the analysis. *Id.* at 1239.

These factors compel application of the comity doctrine to preclude review in U.S. courts of Peru's determination that Guevara was not entitled to the reward. DE 201-9. Of greatest significance, the district court's judgment not only "creates a prospect of conflicting judgments," but actually *does* conflict with the Special Committee's decision. The conflict is particularly striking because the central issue in dispute in this case is whether Guevara satisfied the terms of the *Peruvian* reward program.

The potential for conflict runs much deeper than the district court's decision merely to overturn a single decision of the Special Committee. The Peruvian President's Emergency Decree caps the total reward amount at $5 million. In the event that more than one person provided information leading to Montesinos' arrest, the Special Committee was charged with "divid[ing] among" those persons the $5 million sum. DE119-2, at 2. The district court's $8.2 million judgment against Peru, however, not only exceeds that $5 million cap. More significantly, it means that other courts—both in the United States and elsewhere—could enter another judgment awarding the same $5 million. That result would thwart the Peruvian government's effort to cap the total amount it disbursed in connection with the Emergency Decree, and to provide for appropriate divisions where necessary.

The Special Committee's determination is precisely the sort of decision by a foreign governmental body to which U.S. courts owe deference. Its competence is beyond dispute: the Special Committee comprised four high-level Peruvian officials from law enforcement and the Ministry of the Interior, including the Minister himself. DE 119-2, at 2. Their accumulated

expertise in law enforcement and intelligence put them in a very strong position to ascertain whether certain information did or did not lead directly to Montesinos' capture. And so far as the evidence in the record shows, the Special Committee was fully authorized under Peruvian law to make this determination and its conclusion lay within its lawful discretion.

In the district court, Peru submitted a declaration from a former Peruvian Minister of the Interior who served on the Special Committee from 2001 to 2003. That declaration described the Committee's deliberations, its collection of information, its consideration of testimony, and its repeated requests for more information from the FBI and Guevara's counsel about Guevara's assistance. *See* Second Decl. of G. Costa Santolalla, DE 326-4. This former minister stated without contradiction that Guevara's reward claim was rejected because the available evidence did not support the conclusion that Guevara provided the information leading directly to Montesinos' capture. *Id.* ¶ 16. Instead, "the Special Committee concluded that the acts of the Venezuelan military were an intervening event that broke the chain of causation between Mr. Guevara's telephone call * * * and the arrest of Montesinos." Costa Decl., DE 326-4, ¶ 16. The Minister's declaration was corroborated by a deposition from another former Peruvian Minister of the Interior who served on the Committee from 2001 to 2002 and from 2003 to 2004. Depo. of Fernando Rospigliosi, DE 201-3, at 21.

Nothing in the record suggests that the Committee's determination was tainted by fraud or otherwise violated United States public policy. Indeed, it would be perfectly consistent with U.S. policy to deny a

reward claim in a case in which insufficient evidence connected the information to the eventual arrest, a third party's intervention made the proffer of information irrelevant, or a claimant failed to satisfy the terms of the reward offer. Just as decisions based on such factors by U.S. officials are not amenable to challenge in foreign tribunals, so too should Peru's determination be insulated from collateral attack in U.S. courts.

Deference to the Special Committee's decision is all the more appropriate given that the district court's invalidation of that decision, if affirmed by this Court, could adversely affect the United States' relationship with Peru. That is particularly true here because the target of the $5 million reward was not some common criminal. The Montesinos affair was an international cause célèbre. Montesinos was an infamous former high-level official accused of (and in some cases convicted of) "crimes against government administration, public corruption, embezzlement, crimes against persons, aggravated murder, national security and other[crimes]." DE 119-2, at 2. His arrest was the precipitating event in the collapse of the Fujimori presidency, and both Montesinos and Fujimori have since been convicted in Peruvian courts of serious abuses of power. *See id.* (stating in the Emergency Decree that various officials committed illegal acts between 1990 and 2000, and that Montesinos "stands out among said officials" because of his "involve[ment] in serious crimes which affect the security of the State and society overall").

Even the circumstances of Montesinos' capture were a source of foreign-relations controversy. Although President Hugo Chavez and other Venezuelan officials claimed that Venezuela was single-handedly

responsible for Montesinos' arrest, many Peruvians suspected that Venezuelan authorities had knowingly harbored him. *See* Clifford Krauss, *Former Spy Chief of Peru Captured in Venezuela Lair*, N.Y. Times, June 25, 2001. That the Special Committee's decision arose against the backdrop of a sensitive regional political controversy provides a particularly compelling reason to defer to Peru's handling of the reward question. Given the delicacy of the issue, the Special Committee was entitled to do its work without second-guessing from courts in other countries, including the United States.

Further, and contrary to the district court's view, DE 230, at 9-10, the fact that the Special Committee's reasoning was confidential provides no reason to question its conclusions. As the Emergency Decree makes clear, the evidence presented to the Committee, its deliberations, and its reasoning were to be kept secret in order to protect the safety of claimants. *See* DE 119-2, at 2-3 (directing the Special Committee to adopt specific measures "for the protection and safety of the informant," authorizing claimants to use pseudonyms, and requiring "[a]ll information involving application of this Emergency" to be kept "secret"). Despite these valid concerns, the Special Committee expressly invited Guevara to review the record of its decision within a Peruvian ministry. DE 201-9.

In any event, the Peruvian government's interest in preserving the confidentiality of proceedings touching on sensitive law enforcement functions mirrors the United States' own interest in protecting informant confidentiality and preserving the secrecy of classified information. *See* 5 U.S.C. § 552(b)(1), (7) (protecting classified information and certain "records

or information compiled for law enforcement purposes" from disclosure under the Freedom of Information Act); *cf. Tenet v. Doe*, 544 U.S. 1, 8 (2005) (holding that "[p]ublic policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential" (internal quotation and emphasis omitted)).

Over and above these concerns, the United States has a substantial interest in forestalling reciprocal litigation in foreign tribunals that would interfere with the administration of U.S. reward programs. The State Department, for example, administers three rewards programs that target some of the most dangerous classes of international fugitives: Rewards for Justice, the Narcotics Rewards Program, and Rewards for Information Concerning Individuals Sought for Serious Violations of International Humanitarian Law Relating to the Former Yugoslavia or Rwanda. *See* 22 U.S.C. § 2708.

These three programs fund payments for information leading to the arrest of international terrorists, narco-traffickers, and war criminals, respectively. Under the auspices of the reward programs, the Secretary of State determines, with input from the Interagency Rewards Committee (a group composed of Executive Branch officials), whether to pay a reward and, if so, the amount to be paid. The Department of Defense administers a similar reward program for persons providing "information or nonlethal assistance" in aid of an operation against international terrorism. 10 U.S.C. § 127b(a).

Under all of these U.S. reward programs, a decision to grant or deny a reward is by law "final and conclusive and is not subject to judicial review." 22

U.S.C. § 2708(j); 10 U.S.C.§ 127b(g). This policy makes eminent sense. The federal officials who administer these reward programs must balance a range of competing considerations in deciding whether to grant or deny an individual's claim. As noted earlier, those considerations include the nature and quality of the information provided, the accuracy of the information, whether the individual providing the information is eligible for payment under the terms of the relevant statute or regulation, whether the same or comparable information was obtained from other sources, the degree to which that information actually led to the apprehension of a suspect, the need to protect sensitive sources and methods, whether payment is consistent with national security, and whether nonpayment would undermine the effectiveness of the rewards program. Major and obvious problems would arise if these U.S. reward program decisions were subject to invalidation in foreign courts.

Yet the district court's judgment here seriously threatens to expose decisions that Congress insulated from review in domestic courts to adjudication in foreign tribunals. The risks of such reciprocal litigation are manifold. Foreign courts cannot be counted upon to be sensitive to the wide range of concerns that U.S. officials must take into account in deciding whether or not to grant a reward. And federal officials would likely feel constrained in the exercise of their duties if their decisions were subject to later judicial review in a foreign state. In addition, in attempting to decide whether the terms of a reward program were satisfied, foreign courts might well order intrusive discovery into what precisely a confidential informant told law enforcement officials and how that information did (or did not) satisfy the terms of the reward program. And courts in other

countries may be unsympathetic to U.S. efforts to invoke the law enforcement privilege or to resist the disclosure of classified information.

As if to illustrate the point, the district court in this very case was asked by both parties to compel the FBI to disclose extraordinarily sensitive law enforcement information. *See, e.g.*, DE 289 (providing the FBI's response to Peru's motion to compel discovery). Foreign courts would certainly be presented with precisely the same sorts of requests. Furthermore, the district court rested its decision to grant judgment against Peru in part on the *absence* of evidence in the record to rebut the inference that Guevara provided information leading to Montesinos' arrest. *See* DE 230, at 8 (stating that, "[i]n the absence of evidence to the contrary, it appears that Venezuela learned of Montesinos's location from Guevara and would have been unable to capture him had Guevara not cooperated"). That line of reasoning suggests that a domestic law enforcement agency's resistance to discovery demands could justify a foreign court's decision to overrule a U.S. determination that a particular claimant is not entitled to a reward.

For all of these reasons, international comity precluded the district court from undertaking a review of the factual and legal determinations of the Special Committee. *See Hilton*, 159 U.S. at 202-03 (holding that where "comity of this nation" calls for recognition of a judgment rendered abroad, "the merits of the case should not * * * be tried afresh").

B. Act of State Doctrine.

For many of the same reasons, the district court's judgment against Peru violates a related but separate doctrine—the act of state doctrine. "[I]n its traditional

formulation," the act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts of a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

The doctrine was "once viewed * * * as an expression of international law, resting upon the highest considerations of international comity and expediency," *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 404 (1990) (internal quotation marks omitted), but was described by Justice Harlan in *Sabbatino* as a doctrine with "'constitutional' underpinnings," reflecting "the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder" the conduct of foreign affairs, *Sabbatino*, 376 U.S. at 423.

In this case, the district court's judgment granting Guevara's claim for the reward invalidated Peru's ultimate decision to deny Guevara's claim. That by itself violated the act of state doctrine. But the court's judgment also invalidated the President of Peru's establishment of a specialized tribunal vested with sole responsibility for determining in confidential proceedings whether an individual had satisfied the condition for receiving the reward.

Peru clearly intended the Special Committee's determinations to be exclusive. The four-person Committee was established "for the purpose of evaluating information received and deciding on granting the financial reward," and the reward was due only if information was "provided through any means to the Special High Level Committee." DE 119-2, at 2. Per the Emergency Decree, the Special

Committee alone was charged with assessing the accuracy of the information and with providing protection to an informant who was in danger because of his cooperation. *Id.* And the Emergency Decree contemplated that the Special Committee would divide the total reward among the claimants entitled to it. *Id.* at 2-3.

These provisions are in no sense compatible with having multiple tribunals in different countries address a claimant's entitlement to the reward. Thus, in assuming the authority to dispense the $5 million reward, the district court invalidated the President of Peru's delegation of exclusive decision-making authority to the Special Committee. The act of state doctrine serves to protect against precisely that sort of invalidation. *See Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) (holding that "the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory"). That is particularly so where, as here, the Peruvian President's delegation involved questions relating to the capture of an infamous former government official and where the district court's judgment would, if affirmed, create diplomatic friction. *See Kirkpatrick*, 493 U.S. at 409 (holding that "the policies underlying the act of state doctrine should be considered in deciding whether" it should be applied).

The application of the act of state doctrine here is in no way undermined by this Court's prior conclusion that the Peruvian reward offer constituted a commercial contract. The law of this Circuit is that "there is no commercial exception to the act of state doctrine." *Honduras Aircraft Registry, Ltd. v. Honduras*, 129 F.3d 543, 550 (11th Cir. 1997); *Glen v. Club Mediterranee, S.A.*, 450 F.3d 1251, 1254 n.2

(11th Cir. 2006) (same); *see also International Association of Machinists v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981).

Even assuming that a commercial activity exception existed, the only potential commercial activity at issue here was Peru's extension of the reward offer. The Peruvian President's distinct decision to delegate exclusive authority for deciding who is (and is not) entitled to the reward was non-commercial sovereign activity. *Cf. Horowitz v. United States*, 267 U.S. 458, 461 (1925) (distinguishing between the United States' "public and general acts as a sovereign" and those acts undertaken in connection with a commercial contract). Private parties cannot and do not delegate to specialized committees composed of high-ranking government officials the power to adjudicate whether the conditions of a law-enforcement reward offer have been satisfied. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (holding that an act is commercial only if "the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in trade and traffic or commerce" (internal quotation marks omitted)). Under the act of state doctrine, that sovereign delegation should not be subject to review in United States courts. *Cf. Society of Lloyd's v. Siemon-Netto*, 457 F.3d 94, 102-103 (D.C. Cir. 2006) (holding that the act of state doctrine barred an argument that an English statute unlawfully delegated authority to Lloyd's, a private company).

C. Forfeiture.

The parties dispute whether Peru preserved these justiciability claims in the district court. Whatever the merits of that dispute, the principle that an appellate court will not pass on forfeited arguments

is "not a jurisdictional limitation but merely a rule of practice, and the decision whether to consider an argument first made on appeal is left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Dean Witter Reynolds, Inc. v. Fernandez*, 741 F.2d 355, 360 (11th Cir. 1984) (internal quotations, footnotes, elision, and correction omitted).

As we have explained, upholding the judgment against Peru could have deleterious consequences both for the United States' bilateral relationship with Peru and for the administration of federal reward programs. Standing alone, those potential consequences are sufficiently serious that this Court should exercise its discretion to consider the act of state and international comity arguments. As the Seventh Circuit has noted in a related context, "federal-state comity interests can be considered for the first time on appeal," and the case for overlooking waiver is even "stronger" when the arguments presented touch on "international comity, amity, and commerce." *Fortino v. Quasar Co.*, 950 F.2d 389, 391 (7th Cir. 1991).

The United States has a substantial independent interest in presenting the act of state and international comity arguments to this Court, over and above what Peru may have argued. The two doctrines "aris[e] out of the basic relationships between branches of government in a system of separation of powers," *Sabbatino*, 376 U.S. at 423, and exist in part "to promote cooperation and reciprocity with foreign lands," *Pravin Banker Associates, Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997). The Court should consider and address even late-raised arguments that serve to protect the Executive

Branch's prerogatives, whether or not a party has presented them.

Indeed, even if the United States were not participating, the exceptional nature of this case would warrant this Court's review of any forfeited international-abstention arguments. The strictly legal issues presented by the arguments clearly "presen[t] significant questions of general impact or of great public concern." *Dean Witter Reynolds, Inc.*, 741 F.2d at 361; cf. *Granberry v. Greer*, 481 U.S. 129, 134 (1987) (noting that "principles of comity" may be "better served by addressing the merits forthwith" of forfeited arguments). This Court should therefore exercise its discretion to consider the arguments pertaining to international comity and the act of state doctrine.

II. This Court Need Not Resolve Whether Peru's Reward Offer Had a Sufficient Commercial Nexus to the United States.

As an alternative basis for reversal, Peru has argued that its reward offer bore an insufficient relationship to the United States, and that its commercial activity therefore fell outside the commercial activity exception to the immunity otherwise imposed in the Foreign Sovereign Immunities Act (FSIA).[2] As

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[2] When this Court previously held that Peru's extension of the reward offer amounted to commercial activity, it did not address (because it was not asked to) whether the activity bore the requisite connection to the United States. On remand, the district court declined to consider the question because it appeared to believe that this Court's prior decision "established" the district court's jurisdiction. DE 230, at 10. The nexus argument, however, implicates this Court's subject matter jurisdiction and thus remains viable. *See Harris v. United States*, 149 F.3d 1304, 1308 (11th Cir. 1998) (holding that "the parties are incapable of

relevant here, the exception provides that a sovereign is not immune from suit in any case "in which the action is based * * * upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

The United States takes no position on the highly fact-bound question whether any act undertaken by Peru had a "direct effect in the United States" within the meaning of the FSIA. Nor need the Court resolve this issue, which, although it arises here in an unusual factual setting involving a foreign government's law enforcement reward program, could materially affect the scope of federal court jurisdiction over quintessentially commercial disputes between domestic corporations and foreign states. As noted, the justiciability grounds discussed above—that the judgment violates principles of international comity and the act of state doctrine—provide an alternative and sufficient basis for reversal.

There is no obstacle to addressing international comity and the act of state doctrine before resolving whether this Court has subject-matter jurisdiction. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), requires a federal court to "prioritize [a] jurisdictional issue only when the existence of *Article III* jurisdiction is in doubt." *Chalabi v. Hashemite Kingdom of Jordan*, 543 F.3d 725, 728 (D.C. Cir. 2008). The Supreme Court, however, "explicitly recognized [in *Steel Co.*] the propriety of addressing the merits where doing so made it possi-

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conferring upon us a jurisdictional foundation we otherwise lack simply by waiver or procedural default").

ble to avoid a doubtful issue of statutory jurisdiction." *Id.* (internal quotation omitted). And although they are not jurisdictional in nature, the act of state doctrine and international comity are "threshold question[s]" designed "to preclude judicial inquiry," and as such can properly be addressed before questions of statutory jurisdiction. *Tenet*, 544 U.S. at 6 n.4.

CONCLUSION

For the foregoing reasons, the judgment entered by the district court against the Government of Peru should be reversed.

Respectfully submitted,

HAROLD HONGJU KOH
Legal Adviser
U.S. Department of State
2201 C Street N.W.
Washington, D.C. 20520

TONY WEST
Assistant Attorney General

JEFFREY H. SLOMAN
Acting United States Attorney

/s/
DOUGLAS N. LETTER
(202) 514-3602

/s/
NICHOLAS BAGLEY
(202) 514-2498
Attorneys, Appellate Staff
Civil Division, Room 7226
U.S. Department of Justice
950 Pennsylvania Ave. N.W.
Washington, D.C. 20530

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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2010, I caused an original and six copies of the foregoing brief to be filed with the Court by Federal Express. On the same date, I also caused an electronic copy to be filed with the Court, and caused copies to be served on the following counsel by Federal Express and email:

Michael Diaz, Jr.
Brant C. Hadaway
Carlos F. Gonzalez
DIAZ, REUS & TARG, LLP
100 Southeast 2nd Street
2600 Bank of America Tower
Miami, Florida 33131

Karen Curtis
CLARKE SILVERGLATE & CAMPBELL, PA
799 Brickell Plaza
Suite 900
Miami, Florida 33131

Mark A. Cymrot
Ambika J. Biggs
Andrene L.K. Smith
BAKER & HOSTETLER LLP
Washington Square, Suite 1100
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

/s/
NICHOLAS BAGLEY

MARCH 2010

CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(5) and (6), I certify that this brief has been prepared in a fixed-spaced typeface using Corel WordPerfect 12 in 12-point Book Antiqua font. I further certify that pursuant to Fed. R. App. P. 32(a)(7)(B) that the foregoing brief contains 6,479 words, according to the word count of Corel WordPerfect 12. I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/
NICHOLAS BAGLEY

MARCH 2010